Supreme Court, U.S.
FILED
FEB 7 2002
CLERK

NO. 01-0976

SUPREME COURT OF THE UNITED STATES

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BOBBY HATHCOCK,
Petitioner

versus

ACME TRUCK LINE, INC.,
Respondent

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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# ACME'S BRIEF IN OPPOSITION TO HATHCOCK'S PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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BOBBY HATHCOCK,

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**ACME'S BRIEF IN OPPOSITION TO HATHCOCK'S PETITION FOR WRIT OF CERTIORARI**

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TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
COURT OF THE UNITED STATES

Bobby Hathcock ("Hathcock") was a driver/employee of Acme Truck Line, Inc. ("Acme") and a lessor of capital equipment. Hathcock, as an employee, received a wage. Acme undisputedly withheld and paid the appropriate taxes on those wages. Acme, as lessee, also paid rent to Hathcock in his capacity as a lessor.

Hathcock sued challenging provisions in his Lease Agreement ("Lease," "Lease Agreement," or "Agreement") that resulted in the reduction of the total amount of rent. Hathcock contends that the Agreement is *contra bonos mores*.

The trial court and the court of appeals dismissed Petitioner's lawsuit because his entire case is predicated upon

the erroneous presupposition that all of the monies paid by Acme to him were wages for personal services and that none of the monies represented consideration for lease of capital equipment. Petitioner's writ is absolutely meritless and was properly rejected by the district court and the court of appeals.

## BACKGROUND

Hathcock has owned a 1990 Ford pickup truck since 1995. He leased the truck to Acme pursuant to the Lease. Acme paid Hathcock rent for the truck in accordance with the Agreement.

Hathcock drove the truck for Acme. Acme treated him as an employee, and for good reason. He was. Accordingly, Acme compensated Hathcock with a paycheck.

After Hathcock resigned, he filed suit in state court. There, Hathcock alleged on behalf of himself and others that he was an independent contractor rather than an employee, that Acme breached the Lease, that Acme defrauded him, that Acme was unjustly enriched, and that Acme had committed conversion. He further contended that the Lease was *contra bonos mores*. Finally, Hathcock sought declaratory and injunctive relief.

Acme removed the case to the United States District Court for the Southern District of Texas.

Acme sought summary judgment based on 94 statements of material fact. Hathcock did not dispute any of the 94 statements of material fact. Nevertheless, he filed a

cross-motion for summary judgment. Judge David Hittner granted Acme's Motion and denied Hathcock's Motion, as well as Hathcock's Motion for Reconsideration.

Hathcock appealed. A panel composed of the Hon. Grady Jolly, Jerry L. Smith and Jacques L. Wiener, Jr. affirmed summary dismissal. Hathcock sought reconsideration. Judges Jolly, Smith and Wiener denied the Motion for Reconsideration. Hathcock then filed a Petition for Writ of Certiorari ("Petition").

Judges Hittner, Jolly, Smith and Wiener correctly concluded that Hathcock's allegations were so lacking in merit that summary dismissal was warranted. For that reason and others, Hathcock's Petition should be denied.

## ARGUMENT

### I. HATHCOCK'S PETITION DOES NOT JUSTIFY THE EXERCISE OF JURISDICTION HEREIN

Hathcock does not ask this Court to review the summary determination of his status as an employee. Nor does Hathcock appear to ask this Court to review the summary dismissal of his state law breach of contract, conversion, fraud and unjust enrichment claims. Rather, Hathcock seems to ask this Court to only review whether the Agreement contravenes public policy.

Supreme Court Rule 10 requires a petition to show the existence of a compelling reason to grant a petition. Rule 10

itself describes the type of cases that potentially warrant Supreme Court review.

According to Rule 10, review could be appropriate where an appellate decision conflicts with an opinion of another court of appeal, a state court of last resort, or a decision of this Court. Hathcock's Petition, however, does not claim that the Fifth Circuit's opinion below conflicts with the opinion of another federal court of appeal, a court of last resort of any state in this country or with any decision of this Court.

Review could also be appropriate, according to Rule 10, where an important question of federal law has not been resolved by this Court. Hathcock seems to contend that the Fifth Circuit Court of Appeals has decided an important question of federal law that has not been but should be decided by this Court. Petitioner is wrong for three reasons.

First, Hathcock filed his Petition in state court. He asserted only state law causes of actions. Second, a cursory review of Hathcock's Petition herein shows that most of the statutes which purportedly support his *contra bonos mores* claim are state rather than federal statutes. *See* pp. 3, 4, 5, 11, and 14-16 of the Petition.

Third, Hathcock does not even remotely demonstrate that the decisions and reasoning of Judges Hittner, Jolly, Smith and Wiener are erroneous. Accordingly, there is no reason why this Court should grant the Petition.

## II. THE RELEVANT UNDISPUTED MATERIAL FACTS.

The following Statements of Material Fact[1] appear to be relevant to the issues raised by Hathcock in his Petition for Writ of Certiorari:

1.

Acme transports equipment, materials and supplies throughout the United States.

4.

Acme does not own trucks; rather, it leases vehicles of various sizes from corporations, partnerships, companies and individuals.

5.

Acme employs drivers about half of whom drive their own trucks. Stated differently, about half of Acme's drivers operate trucks owned by another natural or artificial person. For example, Lee Trucking Corporation owns and leases eight trucks to Acme. However, its President, Ronnie Lee, does not drive any of them. Similarly, James Rakowitz (now deceased) owned and leased five trucks to Acme. He drove one of them.

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[1] These were presented with attached deposition testimony exhibits and affidavits to Judge Hittner and with record references to same in the Fifth Circuit. References to same are deleted herein.

6.

Hathcock acquired a 1990 Ford pickup truck with over 85,700 miles on it in April 1995 for $7,050.

11.

On July 18, 1996, Hathcock and Acme executed a Lease Agreement for a 1990 pickup truck.

12.

Pursuant to ¶3 of the Lease Agreement, Acme paid lessors, including Hathcock:

> . . . seventy (70%) percent of the "Earned Revenue derived by the Lessee from the Leased Equipment," as defined herein, **less driver's wages; payroll taxes (including FICA and other deductions)**; cost of medical or hospitalization insurance, if applicable; pre-employment driver application information costs, including cost of obtaining motor vehicle driving record; cost of pre-employment driver medical examinations, testing and screening; cost of driver medical examinations, testing and screening, including driver drug testing, screening, medical evaluations and consultations, and biennial medical examinations as may be required by the U.S. Department of Transportation, Federal Highway Administration or any other

governmental body, **and such other costs or payments made by Lessee by reason of driver employment**, and less any "Operating costs and expenses," and other charges, hereinafter provided, which are incurred by Lessee in connection with the use and/or operation of the Leased Equipment and for which Lessor shall be responsible. (Emphasis added).

13.

Acme executed identical leases with its other natural and artificial lessors.

14.

During the existence of the Lease Agreement, Acme issued Hathcock a weekly settlement check ("rental check") pursuant to and in accordance with paragraph 3 of the Lease Agreement.

15.

Hathcock cancelled his Lease Agreement with Acme on February 6, 1997.

22.

Acme has discharged drivers, while at the same time maintaining (not canceling) the Lease Agreement (lessor/lessee relationship) with said drivers.

56.

Hathcock and other drivers received weekly paychecks ("employee paycheck") from Acme. Acme withheld income, social security and Medicare taxes.

62.

The IRS has conducted an employment tax compliance check on July 18, 1996. At the time, the IRS reviewed and reconciled Forms 940, 941, W-2, W-3, W-4, 1096 and 1099, together with the related compensation and leasing agreements. The compliance check specifically examined the status (employee/independent contractors) of the driver.

63.

The IRS did not find fault with Acme's:

a. Treatment of drivers as employees.

b. Deductions.

c. Accounting.

65.

Acme has submitted its Lease Agreement to federal and state agencies, including the Interstate Commerce Commission ("ICC").

66.

The ICC suggested changes to Acme's Lease Agreement in the late 1980s. The ICC, however, did not suggest, much less require, a change to ¶3 of the Lease Agreement.

67.

Neither the Texas Railroad Commission nor the Public Service Commissions in Oklahoma, Mississippi, Louisiana and Alabama have ever suggested, much less required, a change to ¶3 of the Lease Agreement.

77.

Lessors, such as Hathcock, set drivers wages with parameters (10%-25%) supplied by Acme.

78.

Hathcock chose to pay himself 10% for his driving services.

79.

Hathcock fully understood the operator/interaction of the two-check system as he chose to set the driver wage as low as possible, *i.e.*, at 10%.

80.

Acme paid rental to Hathcock in accordance with paragraph 3 of the Lease Agreement.

81.

Hathcock alleges that his economic damages consist of or are equal to the 23% of driver wages deducted from his rental check pursuant to ¶3 of the Lease Agreement.

82.

Acme and its lessors, including Hathcock, agreed that lessors would share in the costs of driver employment (up to 23% of driver wages) for such things as FUTA, SUTA, FICA, Workers Compensation insurance and more, pursuant to ¶3 of the Lease Agreement.

83.

Hathcock claims that he was self-employed and an independent contractor.

84.

As an independent contractor, however, Hathcock owed FICA and Medicare, as well as income taxes.

85.

Moreover, the cost of duplicating benefits, such as

workers compensation, SUTA, FUTA and the value of 401(k) contributions, when coupled with monies due by independent contractors for FICA, Medicare and income taxes, exceeds the monies actually deducted from Hathcock's rental and employee paychecks.

## III. JUDGES HITTNER, JOLLY, SMITH AND WIENER CORRECTLY HELD THAT THE AGREEMENT DID NOT CONTAIN *CONTRA BONOS MORES* PROVISIONS.

### A. Introduction.

Hathcock did not dispute Statement of Material Fact Nos. 4, 5, 11-14, 56, 80, 81 and 82. These statements and Coatney Affidavit (No. 2)[2] show that Acme paid in full FICA and FUTA to the federal government and SUTA to state governments.

These statements also show that Acme issued all lessors (including Hathcock) a rental check to compensate them for the use of their vehicles, and that Acme issued all drivers (including Hathcock) a paycheck to compensate them for driving vehicles.

These statements, moreover, show that Acme did not pass along to **employees** any of the costs of driver employment. These statements finally show that Acme passed along **some** of

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[2] Coatney Affidavit No. 2 was submitted along with "Acme Truck Line, Inc.'s Response to Plaintiff's 'Factual Basis' that Allegedly Supports his Motion for Summary Judgment."

the costs of driver employment to truck suppliers, *i.e.*, **lessors** such as Hathcock.

### B. The Statutes on Which Hathcock Relies Address Or Relate to Wages and Not Rental Revenues.

Hathcock cites to the provisions calling for payment of FICA and Medicare taxes at p. 3 of his Petition. For example, he represents that employers are required to pay a portion (½), and that employees are required to pay the other half. *See* 26 U.S.C. § 3111(a) and (b).[3] Hathcock, however, does not

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[3] Hathcock does not claim that he has a private cause of action under the Social Security Act, and for good reason. He does not. *See Salazar v. Brown*, 940 F.Supp. 160, 164 (W.D. Mich. 1996); *Spilky v. Helphand*, 1993 WL 159944 at p. 2 (S.D. N.Y. 1993).

Nor is there an implied private cause of action where an employer does not comply with its FICA obligations. *See, e.g., McElwee v. Wharton*, 19 F.Supp.2d 766, 770 (W.D. Mich. 1998) (holding remedy of restitution is not available); *Salazar*, 940 F.Supp. at 164-65; *Spilky*, 1993 WL at pp. 2-3; *Digiovanni v. City of Rochester*, 680 F.Supp. 80, 82-83 (W.D. N.Y. 1988). *See also Deleu v. Scaife*, 775 F.Supp. 712, 716 (S.D. N.Y. 1991) (granting defendant's unopposed motion to dismiss FICA and FUTA claims finding that "Congress [did not intend] to imply a private remedy for violation of these sections of federal tax law").

While Acme is not ethically required to bring contrary authority to the attention of this Court, two district court judges have reached a different conclusion. *See Sanchez v. Overmeyer*, 845 F.Supp. 1178 (S.D. Ohio 1993); *Ford v. Troyer*, 25 F.Supp.2d 723 (E.D. La. 1998). Acme submits that these decisions are not sound.

Regardless, none of these cases involve situations where the employer withheld the employer and employee portions of FICA and, thus, all taxes had been paid. POINT: Even *Sanchez* and *Troyer* do not support Hathcock's claim herein.

contend that these taxes were not paid, and for good reason. They were.

At p. 11 of the Petition, Hathcock cites provisions prohibiting assignments, attachments and garnishments of Social Security benefits (42 U.S.C. §407), even though there are no allegations, much less facts, showing the applicability of 42 U.S.C. §407.

Hathcock also cites 26 U.S.C. §3301which imposes an unemployment tax on employers. There are, however, neither allegations nor facts showing that Acme did not pay all FUTA sums due.

Hathcock further cites provisions requiring Texas employers to pay an unemployment compensation tax based on a percentage of "**wages for employment** paid during a calendar year . . ." (Tex. Labor Code §204.002(a) (emphasis added)) and prohibiting employers from "deduct[ing] any part of [said] contributions from the **wages** of an individual in the employer's employ." Tex. Labor Code §204.003 (emphasis added).[4] *See also* Texas Labor Code 207.073 (same). Again, however, Hathcock cannot point to any evidence showing that Acme failed to pay all SUTA due or that Acme recouped said costs from its **employees**.

Moreover, Hathcock cites La. R.S. 23:1531, which prohibits employers from recouping their SUTA contributions from wages, and La. R.S. 23:532, which sets forth the amount

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[4] Private causes of action are not specifically authorized for violations of this statute and Hathcock has never claimed that one exists.

of the tax. Again, there are no facts supporting an allegation that Acme did not pay SUTA or reduced Hathcock's or anyone else's **wages** to cover its liability for SUTA.

Finally, Hathcock cites §§207.071-73 of the Texas Labor Code that prohibit employers from agreeing to employ persons provided that they agree not to seek unemployment compensation benefits. However, there are no allegations or facts showing the applicability of said provisions herein.

### C. Acme Did Not and Has Not Deducted Sums Representing SUTA or FUTA Contributions, Workers Compensation Premiums and/or FICA from the Wages of Hathcock or Any Other Driver.

#### 1. Wages include monies for driving a truck.

Wages are defined as "all remuneration for personal services." Tex. Labor Code Ann. §201.181. Personal services are those "rendered by the claimant personally." *Tenneco v. Padre Drilling Co.*, 453 S.W.2d 814, 819 (Tex. 1970). *See also Fontenot v. Trans Gulf, Inc.*, 664 So.2d 1238, 1248 (La.App. 1st Cir. 1995) (stating that "wages means the amount earned by the employee through his own labor, rather than profits for his enterprising or rental for any equipment he may provide . . .").

Hathcock, for some reason, fails to cite the provisions in the Louisiana Revised Statutes stating that "[e]mployment,

for purposes of unemployment insurance coverage, is employment of workers who work for **wages** . . ." La. R.S. 23:1472(19)(b) (Emphasis added).[5]

### 2. Wages do not include consideration paid pursuant to a vehicle lease.

Acme compensated lessors for leasing vehicles with one check and paid employees for driving vehicles with another check. Disputes have occasionally arisen over the proper allocation or characterization of wages and rent.

Courts have addressed the proper allocation or characterization of wages v. rent in the context of the amount of benefits due employees who suffer on-the-job injuries when they also lease equipment to their employers. Courts have unanimously concluded that the computation of workers compensation benefits due **employees** does **not** include sums paid for leasing equipment, as said sums do not constitute wages. *E.g., Brown v. Vernon Sawyer, Inc.*, 645 So.2d 260, 263-64 (La.App. 2d Cir. 1994) (basing computation of benefits on gross receipts of each load hauled, with rest representing compensation for the lease of claimant's truck);[6] *Backaus v. Murphy Motor Freight Lines*, 442 N.W.2d 326, 327 (Minn.

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[5] Private causes of action are not specifically authorized for purported violations of Louisiana's Unemployment Compensation Act and Hathcock has never claimed that one exists.

[6] The *Vernon Sawyer* court used 20% concluding same was the industry standard. Lessors set driver wages at Acme within a range of 10% to 23% of each load hauled.

1989) (stating that "[w]ages are compensation for labor and services . . . reflect the worker's ability to earn . . . [and do not] include . . . the income from capital equipment . . ."). *Cf. Delno v. Celebreeze*, 347 F.2d 159 (9th Cir. 1965) (discussing differences between remuneration or wages, which are includable in determining amount due, and rental income derived from capital investments, which are not).

Rental revenues are **not** wages. The operation of ¶3 of the Lease, about which Hathcock complains, reduced rental revenues and not **wages**. The statutes on which Hathcock relies, therefore, do not void the provisions of ¶3 of the Lease.

### 3. Hathcock's inability to distinguish his dual capacity is, to the extent that it is not already clear, discernible by Acme's consistent treatment of all lessors.

Acme has leases with both natural and artificial persons. Some natural and artificial persons own more than one truck and do not drive any of them. Some natural and artificial lessors own numerous trucks and drive only one of them. Some natural and artificial lessors own only one truck and drive it.

Regardless, Acme treats all lessors alike. Pursuant to ¶3 of the Lease Agreement, lessors receive 70% of earned revenues less driver wages and 23% of driver wages in order to

cover some of the costs of driver employment.[7]

That Acme has not violated laws prohibiting deduction from wages for FUTA and SUTA can be gleaned from the following examples.

Lee Trucking Corporation owns and leases eight trucks to Acme. Ronnie Lee does not drive any of them. Rather, at least eight others drive them.

Acme deducts wages paid to those who drive Lee Trucking's vehicles from Lee Trucking's rental checks, pursuant to ¶3 of the Lease. Acme also withholds 23% of wages paid to those who drive Lee Trucking's vehicles from Lee Trucking's rental checks.

If one subscribes to Hathcock's theory of the case, Acme has withheld FUTA, SUTA, FICA and workers compensation premiums from the wages of Ronnie Lee. This, however, is plainly incorrect. Ronnie Lee does not drive; therefore, he does not receive **wages** or **wage checks**.

Likewise, Acme has not deducted or withheld SUTA, FUTA, FICA or workers compensation premiums from the paychecks of those who drive Lee Trucking's eight trucks. Rather, Acme has passed along some of those costs to the lessor, Lee Trucking. This does not constitute a violation of the statutes on which Hathcock relies, as those sums have **not**

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[7] Paragraph 3 of the Lease contains other provisions that reduce rent.

been deducted from the paychecks (wages) of the drivers.[8]

Another dual capacity example involves James G. Rakowitz. He leased five trucks to Acme. Unlike Ronnie Lee, however, he drove one of them.

Mrs. Rakowitz sued Acme's workers compensation insurance carrier seeking workers compensation benefits, after he was killed, while driving to obtain a replacement part for one of the leased vehicles on a day that he was not scheduled by Acme to drive. The Texas Workers Compensation Commission in *Rakowitz v. Zurich American Ins. Co.*, Docket No. SA/98-107023-/01-CC-5A45, denied her claim holding that he was acting in his capacity as lessor, with responsibility to repair the leased vehicle, rather than as an employee at the time of his death. *See* R. at 898-94.

The *Rakowitz* decision clearly recognized that individuals could be both lessors and drivers (employees). The *Rakowitz* decision also demonstrates that worker compensation benefits are only available to one acting in his capacity as an employee at the time of the accident.

Application of the *Rakowitz* decision herein shows that the statutes on which Hathcock relies do not apply when he received rental checks for leasing rather than wages for driving.

Therefore, when Acme passed along some of the costs

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[8] Statement of Material Fact No. 22 evinces dual capacity. Under Hathcock's theory of the case, Acme could not discharge a driver (employee) while maintaining the Lease Agreement with the driver (lessor). But, it has.

of driver employment to its **lessors**, it did **not** violate laws prohibiting it from passing along FUTA and SUTA taxes to its **employees**.

### 4. Summary: A refutation of specific statements in the Petition.

Hathcock, at p. 10, calls the Fifth Circuit opinion "erroneous" and adds that "[t]he wrong is compounded because the **employee** pays both sides of the tax . . ." (emphasis added). At p. 11, Hathcock argues that "Congress intended for the employer to pay its share without reimbursement from the **employee**" (emphasis added).

These arguments deliberately distort facts. Hathcock was not just an employee; he was also a lessor. Hathcock refuses to admit that he leased something of substantial value, was compensated under the Lease Agreement therefor, and that the deductions about which he complains herein reduced his **rental revenue** under the Lease Agreement and did not reduce his **wages**.

At p. 11, Hathcock somehow contends that his FICA, FUTA and SUTA benefits are adversely affected. This represents another distortion of the facts. Acme has **undisputedly** paid all of the FICA, FUTA and SUTA taxes that it owed and owes. Hathcock is eligible to receive benefits to which he is entitled under these statutes. That Hathcock may have received less money under the Agreement for the lease of his truck is irrelevant and unrelated to the amount of FICA,

FUTA and SUTA he might receive one day as a result of his **wage** earnings[9] as opposed to receipt of **rental revenues**.

At p. 11, Hathcock further asserts that Acme is obtaining reimbursement of its FICA, FUTA and SUTA obligations "from **Hathcock, its employee**" (emphasis added). This is again a plain distortion of the facts. The dispute herein involves the amount of **rent** that Hathcock claims he should have received and not the amount of **wages** that Hathcock received.

At p. 11 of the Petition, Hathcock characterizes the facts as follows: "Hathcock is Acme's **employee** when being paid for driving his truck but not when being paid for allowing Acme to allow him to use his truck." That Hathcock must go to such extreme length to mischaracterize **facts** is indicative of the meritlessness of his Petition. Why can't Hathcock just admit that he leased his truck to Acme and that Acme paid him rent therefor under the Agreement? Answer: A fair characterization of the payment dispositively undermines his Petition.

At p. 14, Hathcock attempts to confuse the relationship between the parties. More specifically, the Petition states that "Acme is also illegally shifting the imposition of this tax to Hathcock. Hathcock similarly has no liability for FUTA taxes and hence the deductions are patently and purposefully unlawful." Here, Hathcock merges the concepts of employee

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[9] Hathcock, as lessor, chose to pay the driver (employee) 10%. He could have chosen as much as 25%. Hathcock, therefore, chose to pay less money into his Social Security account.

and lessor into just employee, again ignoring that Acme was paying Hathcock rent for the lease of his truck under the Lease Agreement. *See also* pp. 21-24, *infra* (Hathcock's interpretation is radical and so very, very wrong).

### D. Hathcock's Contention that Acme Has Illegally Shifted Its Tax Burden Is Radical, Very, Very Wrong, and Legally Unsupported.

Hathcock cannot show that Acme recouped any monies representing its FICA, FUTA and/or SUTA obligations from its employees, because Acme **in fact did not**.

Hathcock, therefore, argues that Acme has violated the spirit of said statutes. In order to contend that Acme has violated even the spirit of the law, Hathcock argues that only the employers can pay the taxes.

Acme, however, has undisputedly paid the taxes. Hathcock, therefore, incredibly argues that Acme cannot recoup monies to cover these taxes not only from employees, but also from customers, lessors, or anyone else.

Hathcock's argument is economically radical, totally alien and so very, very wrong.

Every company **can** and **must** cover its overhead or it will go out of business. Assume for purposes of simplicity and clarity that Edsel Motors employs 10,000 persons and that it paid $1,000,000 in salaries in 1998. Assume that Edsel's FICA, FUTA and SUTA costs in 1998 were 23% of salaries or

$230,000. Assume further that Edsel paid $1,000,000 to suppliers in 1998 and that it received $2,645,500[10] for cars which it manufactured and sold.

Edsel has, in this example, made a 15% profit by not only recouping from its consumers the cost of salaries, FICA, FUTA and supplies, but also another $415,500. While Hathcock argues that employers cannot pass along their FICA, FUTA and SUTA obligations to any third party (including consumers), he offers no legal support for the contention and he is just wrong. This is not illegal.

Now assume a slightly different set of facts. Again assume that Edsel employed 10,000 persons, but that its salaries and benefit costs increased by 10% in 1999 so that it paid $1,100,000 in salaries and $253,000 in FICA, FUTA and SUTA. Assume that Edsel knew that it would receive $2,645,500 for cars which it manufactured and sold in 1999 because competition prevented it from passing along these increases to consumers. As a result, assume that Edsel notified its suppliers that it would decrease payments by $123,000 to cover increases in salaries, FICA, FUTA and SUTA. Edsel, therefore, maintained its 15% profit in 1999 because it paid just $897,000, rather than $1,000,000, to suppliers in 1999.

Under Hathcock's legal theory, Edsel has illegally passed along to a third person costs which only it **can** and **must** pay. Suppliers refer to demands to cut costs as "squeezing."

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[10] $2,645,000 represents 115% times $2,300,000. Stated differently, it represents a 15% profit. For purposes of this example, numerous other costs of doing business, such as marketing, utilities, workers compensation, etc., are not included.

Squeezing occurs frequently in our economy.[11] Even though, under this simplistic example, Edsel recoups its increased FICA, FUTA and SUTA costs from its suppliers rather than its customers (consumers), it is not illegal and Hathcock offers no authority whatsoever — analogous, direct or otherwise — that it is.

Here, Acme passes along some of the costs of driver employment to its lessors, *i.e.*, those who supply its trucks. Even if Acme had passed along all of its FICA, FUTA, SUTA and worker compensation costs to its truck suppliers, *i.e.*, lessors, its conduct would be no more illegal than Edsel in either of the aforementioned examples.

Nevertheless, for further clarification, assume that Edsel just informed its suppliers that it would reduce payment by $123,000. That is, Edsel did not state that it was doing so in order to cover increases in salaries and employment taxes. Would anyone, other than perhaps Hathcock, contend that such action was illegal? Of course not.

Likewise, suppose Acme had notified its lessors that it would, in the future, pay only 58% of each haul and did not specify that the 12% reduction was to cover some of the costs of driver employment. That is, Acme did not explicitly state that it was reducing payments under the Lease from 70% to 58% in order to recoup driver wages and 23% of driver wages

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[11] Acme submitted eleven articles from the Wall Street Journal and other newspapers to Judges Hittner, Jolly, Smith and Weiner in support of this statement below.

to cover some of the costs of driver employment.[12]

Hathcock's theory of the case would not void such a lease. Acme, therefore, could reduce rental payments to lessors from 70% to 58% without violating the law. Yet, Hathcock argues herein that the Lease, which has the identical economic impact, is illegal.

Hathcock is plain wrong when he argues that Acme cannot pass along some of the costs of driver employment to its suppliers, *i.e.*, its **lessors**. Acme just **cannot** pass along some of the costs of employment to its **employees**.

The decisions of Judges Hittner, Jolly, Smith and Wiener were correct. Therefore, there is no reason to grant Hathcock's Petition.

### E. The Infirmity of Hathcock's Legal Position Is Exemplified by the Absence of Legal Support Therefor and a Meritless "Parade of Horribles."

#### 1. The absence of legal support.

Acme's Motion for Summary Judgment herein was filed on May 31, 2000. Judge Hittner summarily dismissed the Complaint on July 14, 2000. Hathcock then sought

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[12] Acme pays lessors 70% of each haul less driver wages and 23% of driver wages. Hathcock set his driver wages at 10% of each haul. Therefore, on a haul of $1,000, Hathcock as lessor would receive $700 less $100 less $23 or $577.

reconsideration. Judge Hittner denied Hathcock's Motion for Reconsideration on August 29, 2000. Judges Jolly, Smith and Wiener affirmed Judge Hittner's opinion on September 6, 2001 and denied Hathcock's Petition for Panel Rehearing on October 3, 2001.

Between May 31, 2000 and October 2001, Hathcock was unable to find any case that even remotely supported his position herein. For example, Hathcock submitted the decisions in *Gardner v. Ewing*, 88 F.Supp. 315 (S.D. Ohio 1950), *aff'd*, 185 F.2d 781 (6th Cir. 1950), *aff'd*, 341 U.S. 321 (1951);[13] *Hospital Resource Personnel, Inc. v. U.S.*, 68 F.3d

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[13] There, Charles Warner applied for benefits, but died prior to furnishing proof of his age. Lump-sum death benefits but not primary insurance benefits were awarded, based on a finding that Warner had abandoned his claim for primary insurance benefits. Gardner, the executor of the estate of Charles Warner, then supplied proof of age and eligibility and sued Oscar Ewing, the Federal Security Administrator, seeking benefits.

The court held that the estate was entitled to receive the primary insurance benefits because Warner was an insured who had reached age 65 and who had applied for primary insurance benefits. That is, his benefits vested as of the time he complied with the aforementioned criteria.

The court next addressed defendant's contention that §407(a) prevented the transfer of benefits from Warner to his estate representative. The court rejected this contention, holding that "Congress intended to prohibit voluntary alienation by the wage-earner, nothing more." *Gardner*, 88 F.Supp. at 323.

Hathcock is 51 years old and has never applied for social security benefits. There is no evidence that Hathcock has sought to transfer benefits to any third person. There is certainly no evidence that Acme has somehow sought to transfer Hathcock's benefits to itself or any third person. Section 407(a) and the *Gardner* decision, accordingly, afford no support whatsoever for the proposition that the facts herein constitute a prohibited waiver, assignment or transfer.

421 (11th Cir. 1995);[14] *Phillips v. Phillips*, 820 S.W.2d 785 (Tex. 1991);[15] *Reef v. Mills Novelty Co.*, 89 S.W.2d 210 (Tex. App. 1936);[16] and *United States v. Pomponio*, 528 F.2d 247

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[14] In *Hospital Resources*, the government assessed Hospital Resource about $1,144,000 for unpaid employment taxes. The taxpayer (Hospital Resource) paid and sued seeking a refund contending that it did not owe any employment taxes because its nurses were independent contractors. The court agreed and ordered a refund. *Hospital Resource*, 68 F.3d at 428-29.

[15] In *Phillips*, former spouses, Harry and Martha Phillips, created a partnership to hold their oil and gas interests rather than break same apart when they divorced. Harry Phillips was named the general or managing partner in an agreement which also required him to pay his former spouse ten times actual damages for breaches of trust. When he did not distribute all sums due, she sued to dissolve the partnership and for damages including the stipulated ten times actual damages.

A jury awarded her actual damages. The trial, appellate and Supreme Court however, rejected her stipulated or liquidated damages claim because the stipulated damages provisions contained in the partnership agreement contravened Texas law prohibiting penalty clauses. *Phillips*, 820 S.W.2d at 788-89.

[16] In *Mills Novelty*, B.B. Moseley, an employee of Mills Novelty, assigned commissions due him to Fred Reef. Mills Novelty refused to recognize the assignment based on its contract with Reef prohibiting assignments without its consent. Mills Novelty, accordingly, paid all sums due to Moseley and Reef sued Mills Novelty claiming that Mills Novelty should have paid him.

The *Mills Novelty* court recognized that parties could not contract away a third-party's right to garnish monies. It, however, also acknowledged that parties were free to contract so long as statutes were not infringed. The *Mills Novelty* Court then rejected Reef's claim holding that the contract did not infringe upon any statutory prohibition. *Mills Novelty*, 89 S.W.2d at 241.

(4th Cir. 1975), *rev'd and remanded*, 429 U.S. 10 (1976),[17] to Judge Hittner in support of his argument herein. There is a reason why he did not cite these cases in his Fifth Circuit Briefs and in his Petition herein.

In the Fifth Circuit, Hathcock did not cite even one decision that supported his argument. Now he proffers the decision in *In re Richardson Dinner Theater, Inc.*, 421 F.Supp. 423 (N.D. Tex. 1976). His reliance on the *Richardson Dinner Theater* decision herein is plainly misplaced and just underscores the lack of authority in support of his position.

The court in *Richardson Dinner Theater* did not address the validity or propriety of a lease agreement or anything remotely close or related thereto. Rather, the court resolved the order (priority) of Social Security taxes due by the bankrupt where the estate was so lean that no claims beyond the second priority received assets. More specifically, the *Richardson Dinner Theater* court had to decide whether FICA taxes generated by wages, earned before the date of the bankruptcy but paid after the bankruptcy, would be given a priority one, two or four. Hathcock quotes from that part of the decision

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[17] There, three brothers were charged with filing false income tax returns. The charges stemmed out of their control of a corporation. More specifically, they reported dividends, on which they owed taxes, as loans and deducted losses on their personal returns which belonged to the corporation. The issue on appeal was whether the jury, which convicted them, was properly instructed on defendants' alleged good faith beliefs.

Here, Acme has never been charged with submission of false tax returns and no wonder. It has paid all monies due and has passed IRS audits.

rejecting assignment of a priority two (wages) to the FICA taxes:

> Third, the benefit argument — that it is not unjust to make the employee pay this tax because of its important social purpose to benefit the employee — flies in the face of the statutory intent that the employee should only partially finance the benefits of this system. Inclusion as wages makes the employee pay his employer's share of this tax.

*In re Richardson Dinner Theater*, 421 F.Supp. at 425-26.

"I may not be right, but I'm adamant" seems to be Hathcock's battle cry. Hathcock was an employee **and a lessor**. Acme paid Hathcock a **wage** for driving his truck and **rental** for the lease of his truck. Hathcock continues to ignore the facts. Judges Hittner, Jolly, Smith and Wiener did not ignore these dispositive facts and neither should this Court.

### 2. Hathcock's parade of horribles.

Unable to locate any jurisprudence applying the statutes on which he relies to lessors/suppliers, Hathcock submits a hypothetical in an effort to show that a reduction of monies paid to suppliers is illegal. More specifically, Hathcock hypothesizes at p. 10 of the Petition that employers will lease pencils, desks, shoes, etc. from a person for some unspecified sum, then employ the person, and then pass along some of the costs of employment to the lessor/supplier.

Hathcock cites no real world examples of this practice. And for good reason. He cannot.[18]

There are companies who employ some persons and who have an independent contractor relationship with others. Supplying one's own equipment is an indicia of an independent contractor relationship.

Hathcock's inability to locate even remote support for his argument and to provide a realistic hypothetical just underscores the radicalness and meritlessness of his position. It also demonstrates that the decisions of Judges Hittner, Jolly, Smith and Wiener were correct and that his Petition should be denied.

## CONCLUSION

Hathcock seems to primarily ask for Supreme Court review due to the pendency of other cases. He fears that the decision by the Fifth Circuit will have precedential value and result in the dismissal of these other cases.[19]

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[18] Rent in this example would have to be nominal given the ability of companies to outright buy such goods for 10¢ to $20. FICA, FUTA and SUTA costs, however, exceed $20. Hathcock's example obliviously assumes that the individual would, nevertheless, contract at a loss.

Trucks are far more valuable than pencils or hammers. Unlike pencils and hammers, companies lease vehicles.

[19] Hathcock cites the pendency of five cases at pp. 9-10 of his Petition. He omits disclosure of the fact that he was represented at trial by Gallagher, Young, Lewis, Hampton, Downey & Kim and Williams Bailey Law Firm. He omits disclosure of the fact that these firms represent the plaintiffs in those cases, that a Texas Court of Appeals was set to affirm

The decisions of Judges Hittner, Jolly, Smith and Wiener were undisputedly correct. They are, accordingly, entitled to precedential value.

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the summary dismissal of *Evans v. Dynasty* based on the Fifth Circuit decision herein in *Hathcock*, and that to avoid dismissal, Mr. Evans' attorney stated that Hathcock would file a Petition for Writ of Certiorari.